

1  
2  
3  
4  
5  
6  
7  
8  
9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13 IN RE: FACEBOOK, INC. CONSUMER  
14 PRIVACY USER PROFILE LITIGATION,

15 This document relates to:

16 ALL ACTIONS  
17  
18

CASE NO. 3:18-MD-02843-VC

**DECLARATION OF ALEXANDER H.  
SOUTHWELL IN SUPPORT OF  
FACEBOOK'S STATEMENT IN  
SUPPORT OF SEALING SPECIAL  
MASTER'S ORDERS REGARDING  
PRODUCTION OF ADI RELATED  
DOCUMENTS**

1 I, Alexander H. Southwell, hereby declare as follows:

2 1. I am an attorney licensed to practice law in the State of New York. I am a partner  
3 with the law firm of Gibson, Dunn & Crutcher LLP. I submit this declaration in support of  
4 Facebook's Statement In Support Of Sealing Special Master's Orders Regarding Production Of  
5 ADI Related Documents. I make this declaration on my own knowledge, and I would testify to  
6 the matters stated herein under oath if called upon to do so.

7 2. Attached as **Exhibit A** is a true and correct **redacted** copy of Special Master Garrie's  
8 December 8, 2021 Order Regarding Production Of ADI Related Documents (the "Order"), as filed by  
9 Plaintiffs on December 15, 2021 (Dkt. 765). The redactions are of material that is confidential, and  
10 for which public disclosure would harm Facebook, as explained below and in Facebook's Statement  
11 in Support.

12 3. Attached as **Exhibit B** is a true and correct **unreacted** copy of the Order. Facebook's  
13 proposed redactions are marked with red highlighting.

14 4. Attached as **Exhibit C** is a true and correct **redacted** copy of Special Master Garrie's  
15 December 20, 2021 Amended Order Regarding Production Of ADI Related Documents (the  
16 "Amended Order"), as filed by Plaintiffs on December 22, 2021 (Dkt. 775). The redactions are of the  
17 same confidential material as that in the Order.

18 5. Attached as **Exhibit D** is a true and correct **unreacted** copy of the Amended Order.  
19 Facebook's proposed redactions are marked with red highlighting.

20 6. Facebook initiated the Application Developer Investigation ("ADI" or the  
21 "Investigation") because, in the wake of the reporting of data misuse by Cambridge Analytica in  
22 March 2018, Facebook anticipated that it would have to respond to known and expected legal  
23 challenges in connection with applications and developers that may have had access to large amounts  
24 of user data because they were active before Facebook placed additional, significant limitations on  
25 the amount and type of data developers could request from users through the Facebook Platform in  
26 2014.

27 7. To this end, Facebook retained outside counsel (Gibson, Dunn & Crutcher LLP)  
28 experienced with cybersecurity and data privacy internal investigations to design and direct a new

1 investigation (ADI) that could, among other things, gather the facts necessary for providing legal  
2 advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the  
3 company resulting from potential data misuse and activities by third-party app developers operating  
4 on the prior version of Facebook's platform.

5 8. I led the Gibson Dunn team engaged to develop and conduct the Investigation. I am a  
6 former federal prosecutor and have more than two decades of experience with large-scale, corporate  
7 investigations. The Gibson Dunn team worked with Facebook's in-house attorneys and members of  
8 Facebook's Partnerships, Data Policy, and DevOps teams on the ADI. I and my team at Gibson  
9 Dunn also led the recruitment and retention of technical experts and investigators for the ADI,  
10 including two leading forensic consulting firms with expertise in assisting with technology-focused  
11 internal investigations. These consulting experts operated as an extension of the Gibson Dunn team  
12 to support our provision of legal advice to Facebook, and the investigators worked under the direction  
13 of Gibson Dunn and Facebook Legal. The "ADI team," as used herein, is comprised of Gibson Dunn  
14 lawyers and paralegals, our consulting experts, and Facebook in-house counsel and internal partners  
15 including subject matter experts, all of whom operated at the direction of counsel. At its largest, the  
16 ADI team consisted of over 300 members.

17 9. Gibson Dunn and in-house counsel needed to partner with the outside expert  
18 consulting firms and Facebook personnel to effectively advise Facebook of legal risk. The ADI team  
19 worked at the direction of counsel, relied on counsel's input and guidance, and played a necessary  
20 role in facilitating legal advice by counsel and implementing that advice by the company. The ADI  
21 was an iterative process through which ADI team members, including counsel and subject matter  
22 experts, were able to learn as the investigation progressed. As such, documents initially drafted by  
23 members of the ADI team were generally prepared by or at the direction of counsel, and counsel  
24 edited or otherwise helped shape their contents to ensure they were serving the legal purpose for  
25 which they were created.

26 10. The Investigation was highly complex and addressed millions of applications  
27 operating before changes were made to Facebook's platform. There was no industry standard for  
28 how to conduct such an investigation. Rather, under Gibson Dunn's and in-house counsel's

1 leadership, the ADI team devised and tailored the ADI's methods, protocols, and strategies to address  
2 the specific risks posed by these legal challenges. These proprietary methods and techniques are  
3 valuable to Facebook.

4 11. The methods, techniques, and strategies employed during the Investigation are highly  
5 confidential. Indeed, Facebook has taken numerous substantial steps to maintain the confidentiality  
6 of details regarding the Investigation. For example, details about the Investigation are disclosed to  
7 Facebook employees only on a need-to-know basis. As a result, a limited number of Facebook  
8 employees, counsel, and third-party experts have accessed this highly sensitive information.

9 12. The proposed redactions cover information that would reveal proprietary and highly  
10 confidential aspects of the Investigation. The Investigation was also privileged, and Facebook has  
11 produced ADI-related materials under compulsion over its assertions of attorney-client privilege and  
12 work product protection. Public disclosure of portions of the very information Facebook seeks to  
13 protect would cause Facebook to suffer irreparable harm by publicly disclosing aspects of Facebook's  
14 legal Investigation that Facebook has diligently worked to keep confidential and compromising  
15 Facebook's efforts to assert attorney-client privilege or work product protection over these materials  
16 on appeal or in other actions.

17 13. Facebook asks the Court to permanently seal the names of two consulting expert firms  
18 who assisted with the Investigation on a confidential basis, working at Gibson Dunn's direction. If  
19 these names were disclosed publicly, competitors would have access to confidential information  
20 regarding Facebook's business relationships with third-party experts. Public disclosure could  
21 undermine Facebook's and Gibson Dunn's current and future relationships with third-party vendors  
22 and be used to cause Facebook competitive harm. The Court has previously found good cause to seal  
23 this information. *See* Dkts. 737, 764.

24 14. Facebook also seeks to seal the identities of apps and developers that were  
25 investigated by ADI, as well as a document identifying actions taken against these apps and  
26 developers by ADI. Ex. D to Order Ex. F (Dkt. 513-1, under seal). If this document were publicly  
27 disclosed, these non-party apps and developers could suffer reputational harm because members of  
28

1 the public might infer that they had engaged in wrongdoing, when many apps were suspended for  
2 non-cooperation with ADI.

### 3 Background and Technical Reports

4 15. Facebook asks the Court to seal nine background and technical reports generated by  
5 Facebook's consulting experts during the Enhanced Examination phase of the Investigation. Order  
6 Ex. E (pages 46–419). In the Enhanced Examination phase, apps were selected for further review by  
7 counsel through proprietary risk-based approaches based on counsel's assessment of where and how  
8 the greatest legal risk to the company might arise to provide legal advice to Facebook regarding  
9 potential risks and active and potential litigation. Once an app or developer had been identified for  
10 further review based on criteria that my team had devised, Gibson Dunn and in-house counsel  
11 directed our consulting experts to conduct intensive background and technical investigations, collect  
12 and compile specific evidence that counsel believed particularly salient to their legal analyses, and  
13 report their findings to counsel. Each report for a single developer could include extensive technical  
14 and other details and these reports were specifically tailored by counsel, in substance and format, so  
15 that counsel could evaluate the potential for data misuse and associated legal risks. Reports varied  
16 tremendously based on counsel's instructions and what counsel determined was needed to provide  
17 legal advice. Although the Court ordered Facebook to produce the nine reports attached to the  
18 Orders, Facebook continues to assert that these reports are attorney-client privileged and work  
19 product and has produced these reports under compulsion.

20 16. Enhanced Examination also included application of a proprietary model (called the  
21 Risk-Prioritization Formula) developed under the guidance and with the advice of counsel that  
22 assisted in assessing the risks related to access to data, and the associated legal risks to Facebook,  
23 based in part on the permissions granted to apps and the number of users that authorized specific  
24 permissions. The Risk-Prioritization Formula was used exclusively in the ADI to prioritize apps for  
25 review during the Enhanced Examination phase.

26 17. The nine background and technical reports attached to the Order and Amended Order  
27 were created in the Enhanced Examination phase at the direction of counsel to assist counsel in the  
28 provision of legal advice and that contain or reveal the mental impressions and advice of counsel.

Facebook has produced the nine background and technical reports under compulsion, over its privilege and work product objections. As noted above, Gibson Dunn worked directly with the rest of the ADI team to design ADI-specific investigation reports to contain information relevant to counsel's evaluation of the potential for data misuse and associated legal risk.

18. **Background reports.** Counsel designed the background reports to capture information counsel deemed relevant to assessing the risk of data misuse and legal risk to Facebook. These reports varied in content depending on the particulars of the investigation, as directed by counsel. For example, Gibson Dunn and Facebook's in-house legal team often sought different information from different types of developers (e.g., corporate vs. individual), when providing legal advice.

19. **Technical reports.** Counsel devoted substantial time with the rest of the ADI team, to work through the technical information available about apps and developers on Facebook's platform, understand the significance of that data, and weigh the value of various technical details to our legal risk analysis. With our ADI consulting experts, we identified which details were most relevant to our legal risk analysis for inclusion in the reports. When we needed a more nuanced understanding about the data to render our legal advice to Facebook, working with our technical experts, we designed proprietary analytics (that had not before existed at Facebook and were used exclusively in ADI) in order to score, rank, and better understand the available data. Because our counsel team consistently had questions about certain data points to assist in the rendering of legal advice, over time, those questions were built into the structure of the reports, so that counsel would have the answer at their fingertips to streamline their legal decision-making process.

20. To facilitate our attorney review at scale, we instructed the ADI team regarding the criteria and information that were important to us in rendering our opinion on legal risk, and requested that they, based on these attorney-selected criteria, include preliminary recommendations in their reports to facilitate Gibson Dunn's legal advice about the risk of data misuse. Therefore, the topics of investigation in each report—even including analyses of publicly-available information—reveal the criteria and information that were important to the ADI team's innovative and proprietary analyses.

1           21.     Although counsel may not have drafted each of these documents directly, the  
2 documents created as part of the Enhanced Examination phase were created at the direction of  
3 counsel, reflect attorney advice and mental impressions regarding the evidence counsel deemed  
4 important in rendering legal advice, and were directly used by counsel to provide legal advice to  
5 Facebook.

6           22.     Each background or technical report is focused on a specific developer or set of apps  
7 investigated by ADI and is replete with sensitive business information about third parties. The  
8 background and technical reports were intended to identify potential concerns about third-parties for  
9 counsel to investigate. In some cases, the concerns identified were disproven based on additional  
10 evidence gathered by the ADI team. Disclosure of any portion of these reports would reveal  
11 confidential and highly sensitive information about third parties and—in some cases—cause public  
12 disclosure of information that has not been subject to confirmation or verification. The reports  
13 should be sealed to protect the rights of non-parties.

14           23.     Public disclosure of the background and technical reports could also create security  
15 risks. The Investigation was designed to identify applications that may have misused data before  
16 Facebook implemented additional platform protections. Every portion of the background and  
17 technical reports reveals what information counsel deemed relevant to assessing the potential for data  
18 misuse, as well as the tools and capabilities of consulting experts in investigating that information.  
19 Data misuse and other abuse practices by app developers can be adversarial in nature, meaning that  
20 bad actors commonly attempt to evade technological, investigative and enforcement mechanisms  
21 designed to detect and disrupt abuse. As a result, Facebook has strictly maintained the confidentiality  
22 of ADI details to ensure bad actors cannot use that information in attempts to evade the additional  
23 restrictions on data access that Facebook has enacted. If publicly disclosed, this sensitive information  
24 could make Facebook's enforcement efforts less effective, which would cause harm to Facebook and  
25 its users.

26           24.     The background and technical reports also contain commercially sensitive information  
27 regarding Facebook's technical infrastructure and operations regarding how Facebook stores data. In  
28 investigating the potential for data misuse, reports include details about apps accessing Facebook

1 through API calls, consistent with users' privacy selections. Facebook's methods for protecting user  
 2 privacy and storing user data are valuable. If information about Facebook's API call log system were  
 3 publicly disclosed, competitors could potentially use it to improve their own competing methods for  
 4 managing high volumes of data from interactions with large numbers of third parties.

5 25. The background and technical reports also are replete with confidential information  
 6 about the Investigation's novel methods, processes, and strategies designed and developed by counsel  
 7 in anticipation of litigation. Public disclosure of any portion of the reports would reveal highly  
 8 sensitive information, such as (i) the identities of the apps and developers that were investigated  
 9 during the Investigation, (ii) the information that counsel directed its consulting experts to investigate  
 10 for each app or developer, (iii) the capabilities of the consulting experts in conducting their  
 11 investigation, or (iv) the Investigation's risk assessment for each app. Public disclosure of the  
 12 Investigation's targets, strategies, methods, and capabilities would allow Facebook's competitors to  
 13 copy these proprietary, innovative methods and techniques that Facebook and its counsel developed,  
 14 which would cause Facebook competitive harm.

15 26. For these reasons, the information redacted in the Order and Amended Order is  
 16 "Confidential" under the Protective Order and protected from public disclosure by Federal Rule of  
 17 Civil Procedure 26(c).

18 \* \* \*

19 I declare under penalty of perjury under the laws of the United States of America that the  
 20 foregoing is true and correct. Executed on January 4, 2022 in New York, New York.

21  
22 

23 \_\_\_\_\_  
 24 Alexander H. Southwell